LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

---

No. 75-556

---

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al., Respondents.

---

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

---

POWELL B. GILLENWATER
Browder & Gillenwater, P.C.
3003 North Central Avenue
Suite 2304
Phoenix, Arizona 85012

Attorneys for Transamerica
Title Insurance Company

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

---

No. 75-556

---

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman; TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation; TITLE INSURANCE COMPANY OF MINNESOTA, A Minnesota corporation,
Respondents.

---

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

---

# INDEX

Page

Opinion and Judgments Below . . . . . 1
Question Presented . . . . . 2
Argument . . . . . 2
Conclusion . . . . . 5

## CITATIONS

Page

Cocke v. Transamerica Title Ins. Co. of Arizona, 16 Ariz. App. 556, 494 P.2d 756 (1972) . . . . . 3

Re Gault, 387 US 1, 18 L ed 2d 527, 87 S Ct 1428 (1967) . . . . . 4

## STATUTES AND AUTHORITIES

Arizona Revised Statutes, Section 12-2106 . . . . . 4

Arizona Rules of Civil Procedure, Rule 73(b) . . . . . 1, 3

## OPINION AND JUDGMENTS BELOW

On November 27, 1974, the petitioner sought to appeal to the Arizona Court of Appeals from eight orders and judgments entered by the Superior Court of Arizona in Cause No. C222472. The judgments were entered at various times beginning November 10, 1970, through September 30, 1974. The statutory period for appeal in the State of Arizona is sixty (60) days from the entry of the judgment or order appealed from. Rule 73(b), Arizona Rules of Civil Procedure.

The only judgments that involved respondent Transamerica Title Insurance Company are the judgments entered in favor of Transamerica Title Insurance Company on November 10, 1970, and the judgment upon supersedeas bond and costs entered November 6, 1972. The notice of appeal as to both judgments was filed on November 27, 1974. On February 13, 1975, Transamerica Title Insurance Company of Arizona moved to dismiss the appeal and to impose sanctions for the reason that the appeal was patently untimely and was an attempt to re-appeal a case already previously decided by the Appellate Courts of the State of Arizona. On February 24, 1975, the Court of Appeals entered its Order dismissing the appeal and imposing sanctions. Petitioner did not, during the trial or appellate procedures before the Arizona courts, request a direct ruling by the state courts on any claimed Federal rights.

## QUESTION PRESENTED

Does the dismissal of an appeal filed more than two years after the entry of the orders sought to be appealed present a genuine Federal question for review?

## ARGUMENT

Petitioner has simply ignored the basis upon which the Arizona Court of Appeals dismissed his attempted appeal and is now attempting to lead this Court to believe that a genuine Federal question does exist for review. The facts are:

Petitioner sought to appeal from eight separate judgments and orders entered in the Superior Court of Maricopa County in Cause No. C 222472. The judgments were entered in said cause from November 10, 1970, to September 30, 1974. However, the only judgments that involved the respondent Transamerica Title Insurance Company are the summary judgments in favor of Transamerica entered November 10, 1970, and the judgment upon supersedeas bond and costs entered November 6, 1972.

The notice of appeal as to Transamerica Title Insurance Company was filed on November 27, 1974, over four years after the judgment of November 10, 1970, and two years after a judgment of November 6, 1972. The statutory time for appeal in the State of Arizona

is, pursuant to Rule 73(b), Arizona Rules of Civil Procedure, 60 days from the entry of the order or judgment sought to be reviewed.

An appeal two years after the entry of one order sought to be appealed and four years after the entry of the other order sought to be appealed is patently untimely. Furthermore, petitioner's attempt at appeal was in fact a second appeal by petitioner from the very judgments sought to be reviewed. The judgment of November 10, 1970, was appealed by Mr. Cocke and affirmed by the Arizona Court of Appeals in Cocke v. Transamerica Title Insurance Co. of Arizona, 16 Ariz. App. 556, 494 P.2d 756.

The Order entered on November 6, 1972, granting judgment upon supersedeas bond and costs was likewise appealed by petitioner and dismissed by the Arizona Court of Appeals as a frivdous appeal on October 2, 1973. In that dismissal, the Court of Appeals stated:

> ". . . It is the opinion of the Court that the appeal from the judgment in favor of Transamerica Title is frivolous."
> Appendix to Petition for a Writ of Certiorari, Volume V, pages 451-452.

It is abundantly apparent that the Court of Appeals dismissed petitioner's attempted appeal as to Transamerica Title for the very obvious reason that the appeal was untimely as to both judgments sought to be reviewed by the appeal. It is likewise abundantly apparent that the Court

of Appeals justifiably imposed sanctions for the reason that the appeal was not only patently untimely but was in fact an attempt to re-appeal from judgments already ruled upon by the Arizona Court of Appeals. Arizona Revised Statutes, Section 12-2106 specifically provides:

> "When the supreme court is of the opinion that an appeal has been taken for delay, and that there was not sufficient grounds for taking an appeal, it may include in its judgment an additional amount, not exceeding ten per cent of the judgment appealed from, if the judgment is for the recovery of money, and not exceeding five hundred dollars in other cases, as damages for a frivolous appeal."

Certainly under the facts of this case where the appellant simply ignores the 60-day jurisdictional requirements for appeal and attempts to appeal one order over four years after its entry and the second order over two years after its entry, in a case where both orders have previously been appealed and decided adversely to appellant, it cannot be said that the Court of Appeals abused its discretion in imposing sanctions.

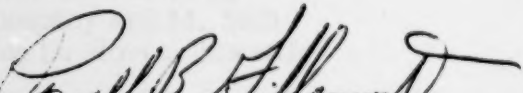
> "This Court has not held that a State is required by the Federal Constitution 'to provide appellate courts or a right to appellate review at all.' " Re Gault, 387 US 1, 18 L ed 2d 527, 87 S Ct 1428

It follows, that a state may lawfully impose reasonable regulations as to time and content of appeals. In the case at bar, there is no contention that the Arizona appellate limitations as to time and content are unreasonable, arbitrary, discriminatory or in any way unlawful.

In summary, petitioner attempted to appeal long after the statutory 60 days had expired. His appeal was promptly dismissed as untimely. The dismissal simply does not present any Federal questions for review.

Respectfully submitted,

BROWDER & GILLENWATER, P.C.

By 
Powell B. Gillenwater
3003 North Central Avenue, Suite 2304
Phoenix, Arizona 85012

Attorneys for Transamerica Title Insurance Company

I hereby certify that on this 5th day of November, 1975, three copies of the Response to Petition for Writ of Certiorari were mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

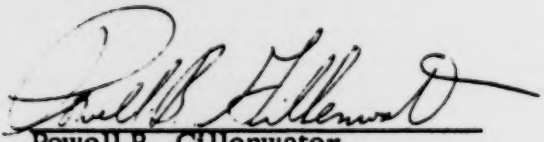
Richard L. Thompson
132 South Central Avenue, Suite 7
Phoenix, Arizona 85004
Attorney for Petitioner

Wallace O. Tanner
3800 North Central Avenue
Phoenix, Arizona 85012
Attorney for respondents Title Insurance Company of Minnesota, James Stewart Company and M. Seth Horne and Maurine D. Horne, his wife

Hubert E. Kelly
550 West Washington Street
Phoenix, Arizona 85003
Attorney for respondents Title Insurance Company of Minnesota, James Stewart Company and M. Seth Horne and Maurine D. Horne, his wife

Loretta S. Whitney
603 Luhrs Building
Phoenix, Arizona 85003
Attorney for respondent
Joan H. Cocke

George Sorenson, Jr.
609 Luhrs Building
Phoenix, Arizona 85003
Attorney for Dorothy Cocke
Haimovitz and Elizabeth
Cocke Francis



Powell B. Gillenwater
Browder & Gillenwater, P.C.
3003 North Central Avenue, Suite 2304
Phoenix, Arizona 85012
Attorneys for Transamerica Title
Insurance Company

# REPLY BRIEF

LIBRARY
SUPREME COURT U. S.

Supreme Court, U. S.
FILED
NOV 26 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

---

No. 75-556

---

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

---

# REPLY TO RESPONSES TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

---

RICHARD L. THOMPSON
132 South Central Ave.
Suite 7
Phoenix, Arizona 85004
(602) 254-7331

Counsel for Petitioner

November 25, 1975

## INDEX


| | Page |
|---|---|
| Respondent's Jurisdictional Statements | 2 |
| Respondent's Statement Of The Case | 3 |
| Respondent's Arguments | |
| I. Alteration of Contracts | 7 |
| II. Indispensable Parties | 8 |
| III. Findings | 13 |
| Conclusion | 16 |
| Certificate Of Service | 17,18 |


## CITATIONS


| | |
|---|---|
| American Ry. Express Co. v. Kentucky, 273 U.S. 269 (1927) | 2 |
| Baltimore & Ohio Railroad Co. v. United States, 298 U.S. 349, 80 L.Ed. 1209 (1936) | 15,16 |
| Cocke v. Cantor, et al., No. 74-1532 | 3 |
| Cocke v. Transamerica, 16 Ariz. App. 556, 494 P.2d 756 (1972) | 6 |
| Cross Lake Shooting & Fishing Club v. Louisiana, 224 U.S. 632 (1912) | 3 |
| Earle v. McVeigh, 91 U.S. 503, 23 L.Ed. 398 (1876) | 16 |
| Goodman v. Newzona Investment Co., 101 Ariz. 470, 421 P.2d 318 (1967) | 8 |
| Howard v. Milwaukee & St. Paul R. Co. 101 U.S. 837, 25 L.Ed. 1081 (1880). | 9,10 |
| Mallow v. Hinde, 12 Wheat. 193, 6 L.Ed. 599 | 11 |
| Manufacturers' Finance Co. v. McKay, 294 U.S. 442, 79 L.Ed. 982 (1935) | 7 |
| Massachusets & S. Construction Co. v. Cane Creek, 155 U.S. 283, 39 L.Ed. 152 (1894) | 11 |
| Mosher v. Hiner, 62 Ariz. 110, 154 P.2d 373 (1944), cert den. 325 U.S. 874 | 10 |

Page

Old Wayne Mutual Life Assn. V. McDonough, 204 U.S. 8 (1907)..... 2,3
Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 19 L.Ed.2d 936 (1968)..... 8,10
Salem Trust Co. v. Manufacturers' Finance Co., 264 U.S. 182, 68 L.Ed. 628 (1924)..... 11
Scott v. McNeal, 154 U.S. 34 (1896) 2
Securities & Exchange Commission v. Frank, 388 F.2d 486 (2nd. Cir. 1968)..... 13,14
Silberblatt, Inc. v. United States, 353 F.2d 545 (1965)..... 14,15
Terrel v. Allison, 21 Wall. 289, 22 L.Ed. 634 (1875)..... 9,10
Wilson v. Oswego Township, 151 U.S. 56, 38 L.Ed. 70 (1894)..... 11
United States v. Birnbach, 400 F.2d 378 (8th Cir. 1968)..... 14

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

---

No. 75-556

---

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman; TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation; TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation,
Respondents.

---

REPLY TO RESPONSES OF

1. JAMES STEWART COMPANY, M. SETH HORNE AND MAURINE D. HORNE, TITLE INSURANCE COMPANY OF MINNESOTA
2. TRANSAMERICA TITLE INSURANCE COMPANY
3. JOAN H. COCKE

TO

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

---

## REPLY

Petitioner here replies to the brief of James Stewart Company, M. Seth Horne, Maurine D. Horne, and Title Insurance Company of Minnesota. The arguments presented by respondents Transamerica Title Insurance Company and by Joan H. Cocke are believed to be encompassed in the brief here replied to.

Respondents at page 2 of their brief cite American Ry. Express Co. v. Kentucky, 273 U.S. 269 (1927 for the long-standing rule that this Court does not interfere with state courts upon questions of purely local law, both statutory and common, unless, as the Court stated, citing three of its earlier decisions:

> ". . .the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights'."

In view of the facts of the case at bar, the trial court judge's splitting of the action involving indispensable parties, the judge's refusal to find facts to support his conclusions, and the judge's alteration of the underlying contract, it follows that without more both of these conditions to review have been met, even had no federal rights been directly violated. Nonetheless, federal rights have been violated. The trial court proceeded after divesting itself of jurisdiction and it is elemental that "no judgment of a court is due process of law if rendered without the jurisdiction in the court. . . ." Scott v. McNeal, 153 U.S.

34, 46 (1896); Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 15 (1907).

The old doctrine followed by Cross Lake Shooting & Fishing Club v. Louisiana, 224 U.S. 632 (1912), cited at page 2 of respondent's brief, was first propounded before the Civil War. While not necessarily involved in the instant case in view of the 14th Amendment, 42 U.S.C. Section 1981, and later decisions of this Court (pp. 24 - 26 of petition and Manufacturers' Finance Co., v. McKay, infra, on alteration of contracts), the startling incongruities in respondent's and Cross Lake's statement of the doctrine raise this fundamental question: since "No State shall. . .pass any . . .law impairing the obligation of contracts", by what authority can a state pass a law setting up a court with power to impair the obligation of contracts?

Respondents maintain that the instant petition is merely a restatement of Cocke v. Cantor, et al., 74-1532. Although that cause arose from the facts of this case, the underlying complaint sought civil damages in federal court under the Civil Rights Act. The cause here was still pending in state court when that action was commenced.

## RESPONDENTS' STATEMENT OF THE CASE

A few misstatements by respondents in their statement of the case are noted here.

Respondent Title Insurance Co. of Minnesota, a Minnesota corporation, was not a party to the October 9, 1968 escrow agreement as made by the parties thereto. Minnesota Title did not come into the picture until October 31, 1973, at which time that

corporation was appointed by the trial court upon application therefor by the Buyers (A. 130), as an officer of the court to close the escrow in the place and stead of Transamerica, because Transamerica had remained unwilling, throughout the term of the escrow agreement and litigation, to comply with the instructions contained in the agreement as made by the parties and with the instructions contained in the agreement as remade by the trial court judge.

Respondents in their statement of the case discuss the Cocke trust but fail to mention that the Arizona courts held the trust to be irrevocable, yet subsequently ordered the trust land proceeds to be paid outside of the trust without regard or even notice to the remaindermen. In any event, a dispute as to the disposition of the proceeds in no way relieved the Buyers or Transamerica from their obligations to comply with the terms of the escrow agreement. Unless this case is to go down in history as establishing the precedents that state court judges may at their discretion rewrite valid trust and escrow agreements and enforce them as rewritten, the question of the disposition of trust land proceeds is moot.

Respondents refer to "the refusal of petitioner to execute certain documents", so covering up the material and fundamentally decisive fact that the only document petitioner refused to execute was a spurious warranty deed prepared by the Buyers and left with the escrow officer with instructions to secure F. M. Cocke's signature thereon. This deed included the right of way of a large drainage canal bordering the land actually proposed to be sold. The Cockes had never acquired title to

this right of way, and it was specifically excluded from the proposed sale by the property descriptions attached to the escow agreement, and was not the subject of any contract entered into by F. M. Cocke. The court never found a specific failure of petitioner to perform any duty, let alone a failure to execute a deed. Indeed, this failure to make findings was a fundamental denial to petitioner of due process.

If the above attempt to secure the warranty deed to land that F. M. Cocke did not own had been successful, it would have resulted in a long delay in close of escrow pending successful conclusion of a quiet title suit against the unknown heirs of a prior owner, with a saving in interest charges against Buyers of more than $80.00 per day. At the time of the attempt, F. M. Cocke's proper deeds (A. 81, 85), bearing the same metes and bounds descriptions as Buyers' judgment of September 27, 1972 (A. 116-118, 123-126), had been in escrow for more than two months. His proper instructions governing the disposition of proceeds from the proposed sale of the trust land, required by the terms of deposit of the trustee Bank's deed (A. 80), had been in escrow since January 21, 1969. Although Buyers in their complaint (A. 173, 176) claimed F. M. Cocke refused to execute the mortgage releases, this claim also was without foundation.

Respondents state that petitioner joined Transamerica for damages resulting from mishandling the escrow transaction. Such is not the case. Although petitioner asked for damages, the relief sought was the return of Sellers' deeds as provided for by the cancellation provisions of the agreement (A. 173, 224-226).

Contrary to respondents' statement in their response at page 4, the state trial court did not dismiss petitioner's counter and cross claims, but split them into separate and independent claims against each of the other three parties to the agreement.

Respondents' statement as to the dismissal, like their statement that Buyers' specific performance action was affirmed by Cocke v. Transamerica, 16 Ariz. App. 556, 494 P.2d 756 (March, 1972), is a misstatement of fact and misleading, and is apparently taken from the almost identical statement contained in the Memorandum and Order of the federal district court in 74-1532 (A. 157, 158, 159). Buyers' conditional judgment was not entered until September 27, 1972 (A. 116), and Cocke v. Transamerica, supra, in which petitioner pointed to the court's lack of jurisdiction in the absence of Buyers and Joan H. Cocke, was decided in March, 1972. Buyers' final judgment against F. M. Cocke, which affirmed that the September 27, 1972 judgment was merely a conditional judgment by ruling that at least one of the specified conditions had been fulfilled, was not entered until September 30, 1974 (A. 165).

The timely appeal from this final judgment of September 30, 1974 was dismissed February 24, 1975 (A. 542) as frivolous, along with the other earlier judgments or orders merged in the final judgment, on the claimed ground of res judicata. Transamerica's judgments were summary, as was the minute order of November 10, 1970 granting specific performance to Buyers.

## RESPONDENTS' ARGUMENTS

### I.

### ALTERATION OF CONTRACTS

Respondents claim that the trial court's adding over four years to the escrow agreement for Buyers to perform, in the face of petitioner's 13-day notice of cancellation, was within the court's equity jurisdiction. The alteration, in effect, deleted all cancellation provisions from the agreement, long after the agreement was cancelled in accordance with their terms.

Respondents cite two cases and C.J.S. in support of the well-settled rule that specific performance of a valid contract (not selected parts thereof, as here) is within the equity jurisdiction of a court, and later cite five more cases for the equally well-settled rule that in equity a judge can grant such relief as the circumstances demand, in order to do equity.

In support of the rule in equity that a valid contract must be given full force and effect even though the contract is unwise or improvident or its enforcement is harsh, the Court in Manufacturer's Finance Co. v. McKay, 294 U.S. 442, 449, 79 L.Ed. 982, 986 (1935), said:

> "But it is well settled, this court said in Hedges v. Dixon County, 150 U.S. 182, 189, 37 L.Ed. 1044, 1047, 14 S.Ct. 71, 'that a court of equity, in the absence of fraud, accident or mistake, cannot change the terms of a contract'."

There have been no allegations of accident or mistake in the instant case, nor any allegations of fraud even attempted to be perpetrated by F. M. Cocke.

As pointed out by Goodman v. Newzona Investment Co., 101 Ariz. 470, 421 P.2d 318, 320 (1967), where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto. In the instant case there have been no allegations that the cancellation provisions are other than clear and unambiguous, or that Buyers or their counsel, Wallace O. Tanner, were not aware of their terms.

II.

INDISPENSABLE PARTIES

At pages 9, 10 of respondents' brief, they challenge in the language of the district court in 74-1532 petitioner's claim that Buyers' failure to join Transamerica, as the escrow agent and title insurer under the escrow agreement, left the court without subject matter jurisdiction over Buyers' action for specific performance of the escrow agreement.

Respondents have misconstrued Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968). As pointed out in respondents' quotation, "a court does not know whether a particular person is indispensable until it has examined the situation to determine whether it can proceed without him". But as plainly specified by Rule 19(a), 16 A.R.S. and Federal Rules of Civil Procedure, a person in whose absence complete relief cannot be

accorded among those already parties shall then be joined, where plainly subject to joinder as here. In any event, Transamerica was brought before the court by petitioner, the court was made fully aware that as escrow agent and title insurer Transamerica was indispensable to specific performance of the escrow agreement, and then proceeded to sever the action. Even a cursory examination of Buyers' complaint (April, 1969; A. 173) reveals that it sought as relief issuance by Transamerica of its title policies and delivery to the Buyers of the deeds and mortgage releases held by Transamerica. A copy of the agreement of the parties (A. 54-79) was attached to the complaint.

Further, the Buyers admitted that specific performance of the escrow agreement could not be attained without action by Transamerica. On September 7, 1973 they applied for a writ of assistance ordering Transamerica's performance (A. 130, 141-145: items 11, 12, 13; items 1-4 of prayer). However, in its Order of October 31, 1973 granting the writ, the trial court found that Transamerica remained unwilling to act in any manner in connection with the escrow agreement as modified by Buyers' judgment of September 27, 1972, and proceeded to substitute Minnesota Title as escrow agent, with all of Transamerica's rights, privileges and duties (A. 146, 147, 148, 149).

A writ of assistance can only issue against parties joined in the action. In Howard v. Milwaukee & St. Paul R. Co., 101 U.S. 837, 849, 25 L.Ed. 1081, 1084 (1880), citing Terrel v. Allison, 21 Wall. 289, 292, 22 L.Ed. 634, 635 (1875), the Court said:

> "Authorities are scarcely needed to support these propositions, it being universally admitted that

writs of assistance can only issue against parties affected by the decree, which is only saying that the execution cannot exceed the decree which it enforces; . . ."

In Terrell V. Allison the Court also stated the longstanding rule that the power of a court to enforce its judgment or decree is coextensive with its jurisdiction over the subject matter: where without power to enforce the judgment, it is without jurisdiction. See Rule 12(b)(7,6,1) 16 A.R.S. and Federal Rules of Civil Procedure; Federal Rule 12(h)(2,3), Arizona Rule 12(i)(2,3).

Mosher v. Hiner, 62 Ariz. 110, 154 P.2d 373 (1944), cert. den. 325 U.S. 874, held that any person interested in the subject matter of action who has a personal interest in the judgment is a "real party in interest" within the statute regarding parties, and unless joined in the action he cannot be bound by the judgment, citing the Arizona Code, 1939, Section 21-501, now 16 A.R.S. Rule 17(a) and Federal Rules of Civil Procedure 17(a).

Respondent's reliance on the district court's pronouncement that Rule 19(b) is equitable, not jurisdictional, and is controlling here, is misplaced. Rule 19(b) applies only when joinder is not feasible. In the case at bar, the indispensalbe parties were clearly subject to service and joinder: the provisions of Rule 19(a) control, and joinder is mandatory, not equitable.

In the district court's quoted case, Provident Tradesmens Bank & Trust v. Patterson, supra, the Court at U.S. 121, 122, L.Ed. 951, quoted and approved the early

case Mallow v. Hinde, 12 Wheat. 193, 6 L.Ed. 599, which upheld the dismissal of the complaint even though the absent party could not be joined because not within the territorial jurisdiction of the lower court, on the fundamental principle that no court can adjudicate directly upon the rights or obligations of a real party in interest without that person being before the court.

This same fundamental principle was adhered to by this Court in Salem Trust Company v. Manufacturers' Finance Company, 264 U.S. 182, 190, 68 L.Ed. 628, 631 (1924). Citing Wilson v. Oswego Township, 151 U.S. 56, 38 L.Ed. 70 (1894), and Massachusetts & S. Construction Co. v. Cane Creek (1894), 155 U.S. 283, 39 L.Ed. 152, the Court pointed out that where the object of the suit is to recover possession of personal property, the one in possession is a necessary and indispensable party.

The doctrine of these cases is embodied in Rule 19(a). The obvious confusion as to the intended effect of the amendment to Rule 19 merits consideration by this Court. The status of real parties in interest, Rule 17(a), should be clarified.

In the circumstances of this instant case there was a controlling reason why Buyers were indispensable in any determination of Transamerica's rights to attorney fees from F. M. Cocke under paragraphs 8, 9 or 10 of the escrow agreement (A. 59, 60), and also why Transamerica was indispensable in any determination of Buyers' right under paragraphs 16, 17 and 18 of the agreement (A. 62) to have the escrow closed instead of cancelled.

Under paragraph 18, cancellation is

plainly mandatory and self-executing in the event of the Buyers' failure to timely comply. The escrow agreement, and any rights of Transamerica thereunder, except for its right to the relatively minor charges provided for by paragraphs 19-21, become automatically cancelled: Buyers' failure to comply has put an end to Transamerica's rights under its paragraphs 8, 9 and 10. Patently, a final determination of whether or not Transamerica was entitled to the attorney fees could not be made without first determining whether the agreement had become cancelled by Buyers' failure to comply.

Likewise, under paragraph 24 (A. 64) cancellation is also mandatory and self-executing in the event of the unwillingness or inability of Transamerica as escrow agent to comply with the escrow instructions, or the unwillingness of Transamerica as title insurer to issue a title policy. No notice to or by any party is required. Except for Transamerica's rights to escrow charges, the escrow agreement and any rights of Buyers thereunder become automatically cancelled: Transamerica's unwillingness or inability has put an end to Buyers' rights. Patently, a final determination that Buyers were entitled to have the escrow closed instead of cancelled could not be made without first determining whether the agreement had become cancelled by Transamerica's unwillingness or inability as escrow agent to comply or its unwillingness as title insurer to issue a title policy.

As maintained by F. M. Cocke throughout the more than five years in the state trial court (April 22, 1969 - September 30, 1974), because of the failure of the Buyers to comply the escrow agreement became

cancelled under paragraph 18 at close of business on March 19, 1969. See Transamerica's March 6, 1969 notice to Buyers that they must comply by March 19, 1969 (A. 88 - 90); Buyers' letter containing their new demands for the extra land and noting the deficiency of $64,000 in their mortgages, received into escrow on March 7, 1969 (A. 91); the separate agreement of November 27, 1972 between Buyers, Transamerica, and Joan H. Cocke that Buyers would at that late date provide additional funds to cover the admitted deficiency (A. 96); and Buyers' letter to Transamerica unsuccessfully demanding that it close the escrow and noting Buyers' deposit of additional funds in January, 1973, in order to comply (A. 99).

As maintained by F. M. Cocke beginning in June, 1969 when he filed his counter and cross claims (with leave of court first obtained to bring in Transamerica) against the other three parties to the escrow agreement, the agreement became cancelled under paragraph 24 on March 10, 1969 by the escrow agent's written notice to Sellers that by Buyers' deposit into escrow on March 7, 1969 of their new demands and deficient mortgages Buyers had complied (A. 95), and by its undisputed announcement on March 20, 1969 that it was unwilling to issue a title policy to Buyers.

## III.

## FINDINGS

At page 10 of respondents' brief they cite Securities & Exchange Commission v. Frank, 388 F.2d 486 (2nd Cir. 1968) as holding that findings are not a jurisdictional requirement. The case holds only

that findings are not a jurisdictional requirement for appeal. At 493 the court said:

> ". . .the conflicting affidavit, together with the absence of findings, leave us in the gravest doubt just what the district judge thought the facts to be."

And:

> "The judgment is reversed for further proceedings consistent with this opinion."

In United States v. Birnbach, 400 F.2d 378 (8th Cir. 1968), the court at 382 quoted the Advisory Committee for the statements that the findings should represent the judge's own determination and not the statements of successful counsel, and should be a part of the judge's opinion and decision.

Respondents rely on Silberblatt, Inc., v. United States, 353 F.2d 545 (1965), as standing for the proposition that "findings of fact need only be made in sufficient detail. . .to indicate the factual basis for the ultimate conclusion reached by the court" (brief, p. 11). Such reliance is misplaced. The court in Silberblatt said:

> "Findings of fact must be made in sufficient detail and exactness 'to indicate the factual basis for the ultimate conclusion' reached by the court. Kelley v. Everglades Drainage Dist., 319 U.S. 415, 422, 63 S.Ct. 1141, 1145, 87 L.ed. 1485 (1943). . . ."

(emphasis added)

And in footnote 11 added:

> "The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence. Carr v. Yokohama Specie Bank, Ltd., 200 F.2d 251, 255 (9th Cir. 1952). . . ."

In none of the proceedings, orders or judgments in the state trial court was there any specification under Rule 56d on summary judgments or any findings under Rule 52a on trials to the court on the existence or effect of the cancellation provisions themselves (paragraphs 16 through 25, A. 62-64), or on the existence or effect of the documents listed above at page 13, and included in the Appendix at pages 90, 91, 96, 99 and 95. Rules 52, 56, 16 A.R.S. and Federal Rules of Civil Procedure.

In any event, the ultimate conclusion of the state trial court was that plaintiff Buyers were entitled to specific performance. The facts found which supported this conclusion were: "Cocke has refused to convey the property to Stewart or the Hornes" (A. 112), and "Cocke has refused, and still refuses, to perform the agreement. . ." (A. 122). The facts found were nothing more than conclusions, based on indifference to the actual facts.

In Baltimore & Ohio Railroad Company v. United States, 298 U.S. 349, 368, 369 (1936), the court said:

"The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."

In Earle v. McVeigh, 91 U.S. 503, 507, 23 L.ed 398 (1876), the court said:

". . .Standard authorities lay down the rule, that, in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the want of jurisdiction makes it utterly void and unavailable for any purpose. Borden v. Fitch, 15 Johns. 141.

Respectfully submitted this 25th day of November, 1975.

RICHARD L. THOMPSON
132 South Central Avenue
Suite 7
Phoenix, Arizona 85004
(602) 254-7331
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November, 1975, three copies of the Reply To Responses To The Petition for Writ of Certiorari were hand-delivered or mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

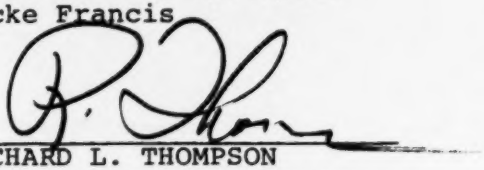
Wallace O. Tanner
Attorney for respondents
Title Insurance Company of
Minnesota, James Stewart Company
and M. Seth Horne and Maurine D.
Horne, his wife
3800 North Central Avenue
Phoenix, Arizona 85012

Hubert E. Kelly
Attorney for respondents
Title Insurance Company of
Minnesota, James Stewart Company
and M. Seth Horne and Maurine D.
Horne, his wife
550 West Washington Street
Phoenix, Arizona 85003

Powell B. Gillenwater
Browder & Gillenwater, P.C.
Attorneys for respondent Transamerica
2304 First Federal Savings Building
3003 North Central Avenue
Phoenix, Arizona 85012

Loretta S. Whitney
Attorney for respondent Joan H. Cocke
603 Luhrs Building
Phoenix, Arizona 85003

George Sorenson, Jr.
609 Luhrs Building
Phoenix, Arizona 85003
Attorney for Dorothy Cocke
Haimovitz and Elizabeth
Cocke Francis



RICHARD L. THOMPSON
132 South Central Avenue
Suite 7
Phoenix, Arizona 85004
(602) 254-7331
Counsel for Petitioner

# CERTIORARI DENIED